IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1940.

No. 859.

WILLIAM S. LOVELL AND DOUGLAS GORDON LOVELL,
Petitioners and Cross-Respondents,

versus

DULAC CYPRESS COMPANY, LTD., AND J. M. BURGUIERES COMPANY, LTD.,
Respondents and Cross-Petitioners.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Louisiana, which appears at page 79 of the record, was rendered by the Honorable Wayne G. Borah, District Judge on February 29, 1940, ~~and has~~

31 Fed. Supp. 919
~~not been officially reported~~. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was rendered on January 14, 1941 ~~and has not as yet been officially reported;~~ (117 Fed. (2d)) Circuit Judge Hutcheson was the organ of the court in this opinion, which was concurred in by Circuit Judge McCord and dissented from by Circuit Judge Sibley. This opinion appears at page 114 of the record.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is January 14, 1941. (R. 114.) Upon timely application, a rehearing was denied on February 12, 1941. (R. 140.)

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended (Act of March 3, 1891, c. 517, §6, 26 Stat. 828; as re-enacted by Act of March 3, 1911, c. 231 §240, 36 Stat. 1157; as amended by Act of Feb. 13, 1925, c. 229, §1, 43 Stat. 938) U. S. C. titl. 28, §347 (a).

3. The nature of this case and of the ruling below are such as to bring the case within the statutory provision relied on in that this case is in the United States Circuit Court of Appeals for the Fifth Circuit, and that said court has rendered a final judgment on the merits

herein against defendants (in part) and that defendants are aggrieved and injured thereby.

4. The cases believed to sustain said jurisdiction are as follows:

Forsyth v. Hammond, 166 U. S. 506.
Gay v. Ruff, 292 U. S. 25.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under "I" (pp. 1-6), which statement, for purposes of brevity, is hereby adopted and made part of this brief.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the evidence in the cause, and particularly the instrument signed by the Register of the State Land Office, dated February 14, 1912, and the notation on the Auditor's record, "Atchafalaya Basin Levee District Fund", did not evidence a proper conveyance to the Board of Commissioners of the Atchafalaya Basin Levee

District from the State of Louisiana, and in not holding that such conveyance inured to the benefit of defendants.

2. In holding that the case of *State ex rel. Fitzpatrick v. Grace*, 187 La. 1028, 175 So. 656, was decisive of the issue of title in this cause and in applying the doctrine of that case to the one at bar.

3. In failing to sustain the pleas of prescription of ten and thirty years *acquirendi causa* filed by defendants in support of their title and in bar of plaintiffs' demand and in failing to reverse the judgment and decree of the District Court in this respect.

4. In failing to sustain the plea of prescription of six years filed by defendants based on Act 62 of 1912.

5. In entering a final judgment herein and denying a rehearing after its attention had been called to the pendency of the state court suit involving the same issues; however, in case certiorari is not granted herein in due time on account of any of the above errors, then defendants show that this Honorable Court should postpone any decision hereon until a final adjudication has been had in the state court, whether said final adjudication is by judgment on appeal or by permitting the decision of the lower court to become unappealable.

V.

ARGUMENT.

Summary of the Argument.

The instrument executed by the Register, dated February 14, 1912, was sufficient to vest title in the Levee Board, whether the instrument executed by the Register be considered as a conveyance or as a recognitive act; and, in the alternative, the transfer should be conclusively presumed to have been made. The case of *State ex rel. Fitzpatrick v. Grace* is neither determinative of or pertinent to this case, in spite of the fact that the Court of Appeals based its holding thereon. Also, in spite of the decision of the Court of Appeals, it is urged that prescription does run against a tax debtor while his property is in the State. And the prescription of six years under Act 62 of 1912 applies to a transfer by a levee board as well as to patents. Finally, the Court, in the event that certiorari is not granted in due course, should hold this matter under advisement pending a final adjudication in the state court.

POINT I.

The Instrument executed by the Register to the Levee Board was Sufficient to Vest Title in said Board, whether the Instrument of the Register be considered as Sufficient in itself, or whether it be regarded as a Recognitive Act. In the Alternative a Proper Deed is Presumed to have been Executed.

A. The lands here in controversy were embraced within the statutory grant made by the State of Louisiana to

the Board of Commissioners of the Atchafalaya Basin Levee District (Louisiana Act 97 of 1890, Sec. 11-R. 82) by virtue of which the State granted to the Levee Board all of the lands sold to the State at tax sale within the limits of the Board's jurisdiction. Said statute also provided, however, that after a period of redemption had expired it should be "the duty of the Auditor and the Register of the State Land Office on behalf of and in the name of the State, to convey to the said Board of Levee Commissioners *by proper instruments of conveyance* the lands hereby granted or intended to be granted and conveyed to said Board, whenever from time to time said Auditor and said Register of the State Land Office, or either of them, shall be requested to do so by said Board of Levee Commissioners, or by the president thereof, and thereafter said president of said Board shall cause said conveyances to be properly recorded in the recorder's office of the respective parishes wherein said lands are or may be located, and when said conveyances are so recorded the title to said land, with the possession thereof, shall, from thenceforth vest absolutely in said Board of Levee Commissioners, its successors or grantees. . . ." (R. 82.)

A page in one of the record books maintained in the office of the Auditor (who at the time in question had jurisdiction of lands adjudicated to the State for taxes —R. 70) bears a notation stamped after the description of the Lovell lands: "Atchafalaya Basin Levee District Fund." (R. 64.) The undisputed testimony of employees of the Auditor's office and the Land Office was that they had considered this notation to mean that the land opposite

the notation had been transferred to the Levee Board. (R. 90, 91, 99.) On February 14, 1912, the Register (to whom at that time the jurisdiction over tax lands had been transferred—R. 64) executed an instrument, excerpt from which reads as follows (R. 29):

"State of Louisiana,
"Parish of Terrebonne.

"I, Fred J. Grace, Register of the State Land Office, do hereby certify that the records of the State Land Office show that the following described lands which were sold to the State of Louisiana, for the years enumerated on assessment in the names of the parties stated have been transferred to the Atchafalaya Basin District Levee Board, under the provisions of Act No. 97, of the Acts of the General Assembly of 1890; said lands being situated in the parish of Terrebonne, State of Louisiana:

"Lovell, W S tax year 1894,

"1st. A certain tract of land being 23, 24, 25, 26, 27, 28, 29 and 30.

"2nd. Lots 2, 3, 4, of Section 69 and fractional sections 74 T 19 S R 17 E., and containing Fourteen Hundred and three acres. Vol. 5 pg. 49.

"Lovell, W S tax year 1894,

"389 acres of land being the E½ of E½ of Sections 73 and SE¼ of SE¼ of SW¼ of NE¼ of S½ of Section 76 T 19 SR 17 E. Vol. 5 pg. 49.

(The descriptions of other properties are omitted.)

"Given under my hand and Official Seal of Office, at Baton Rouge, La., on this Fourteenth day of February, 1912.

"Signed: Fred J. Grace, Register of the State Land Office."

This instrument was duly recorded in Terrebonne Parish on February 19, 1912. (R. 30.)

It is our contention that said instrument is "a proper instrument of conveyance" under the terms of the statute above quoted, and that it operated to transfer title to the Levee Board. Plaintiffs contend that said instrument is nothing but a certificate; that it contains no words of conveyance but is simply a declaration that the lands "have been transferred". However, the Supreme Court of Louisiana in the case of *Saunders v. Bolden*, 155 La. 136, 98 So. 867, held that a deed reading—

> "This is to certify that I have sold the Judie Lewis place to Abe Bolden, and he has 10 years to pay for same; $50 per year."

—was "a perfect grant and translation of the land". In view of said case, it is submitted that the instrument in this case in which the Register declared that (R. 29) "I do hereby certify that the records of the State Land Office show that the following described lands . . . have been transferred to the . . . Board" is sufficient to evidence the performance by him of the mere ministerial duty of describing and fixing the location and identity of the lands embraced within the grant previously made by the Legislature. See also: *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440.

The recent decision of the District Court of Terrebonne Parish, which is hereinafter more fully discussed under Point 5, holds that said instrument was sufficient to convey, and did convey, title to the Board. *Lovell v.*

Fitzpatrick, No. 11,193, 17th Judicial District Court for the Parish of Terrebonne, State of Louisiana, decided April 8th, 1941. It is, accordingly, submitted that the decision of the Court of Appeals on this question is erroneous, and should be reversed.

B. If the instrument executed by the Register is not considered as a sufficient conveyance under the terms of Section 11 of Louisiana Act 97 of 1890, then, we respectfully submit that said instrument constituted a recognitive act under *Article 2271 of the Louisiana Civil Code of 1870,* which reads as follows:

> "Recognitive acts—Force and effect.—Recognitive acts do not dispense with the exhibition of the primordial title, unless its tenor be there specially set forth.
>
> "Whatever they contain over and above the primordial title, or different from it, is of no effect.
>
> "Nevertheless, if there be several recognitions conformable, supported by possession, one of them being dated thirty years back, the creditor may dispense with the exhibition of the primordial title."

Therefore, as the production of the original title is dispensed with, the recognitive act operates as a written recorded conveyance to the Levee Board sufficient to vest title in it under the statute.

At this point we also wish to call the Court's attention to the fact that the decision of the District Court of Terrebonne Parish, above mentioned, specifically states, after holding said instrument to be a sufficient convey-

ance, that even if the instrument were not considered a sufficient conveyance, it would operate as a valid recognitive act. (Appendix A, p. 30.)

C. In the event that it were to be considered that under no circumstances could the instrument executed by the Register be a valid conveyance to the Board, then it is respectfully submitted that the evidence in this case, together with the rule that all public officers are presumed to have done their duty (*Martin v. Mott*, 12 Wheat. 19; *Wood v. Frickie*, 120 La. 180, 45 So. 96; *Hampton v. Drew*, 145 La. 374, 82 So. 375), shows that a proper conveyance was in fact executed and was lost or mislaid.

Accordingly, in view of the argument under sub-points A, B and C, above, it is submitted that the Court of Appeals was in error in holding that no proper transfer had been made to the Levee Board.

POINT 2.

State ex rel. Fitzpatrick v. Grace is Neither Determinative of or Pertinent to this Case.

The Court of Appeals held that the case of *State ex rel. Fitzpatrick v. Grace*, 187 La. 1028, 175 So. 656, was determinative of the issue of title involved in this case. (R. 118.) In so doing, and in basing its opinion thereon, it is submitted that the court erred, for it clearly appears that the issues involved in that case are not the same as those involved in the instant case, and that that case does not purport to decide said issues. In the *Fitzpatrick* case an attempt was made to force the Register of the State Land Office and the State Auditor, by way of

mandamus, to execute a conveyance to the plaintiff, who held under a chain of title from the Levee Board. The action did not involve the actual question of title to the lands as against the original tax debtor. Accordingly, *by seeking the execution of the statutory transfer from the proper officers,* the plaintiffs in that case cannot have been claiming *that an actual conveyance had been made to the Levee Board* prior to the date of the statute withdrawing the grant to the Levee Board, for if any such conveyance had been made prior to said date *it would not have been necessary to seek to compel the execution of such a conveyance.* Furthermore, in speaking of the question of impairment of vested rights, the court in the *Fitzpatrick* case (at page 1050) expressly excepted from its remarks in regard thereto any lands which were sold by the Levee Board to which title had been obtained in the manner provided for in the Act of 1890 and prior to its repeal in 1924. In the instant case, on the other hand, it is our contention that such a proper conveyance *was* made prior to the repeal of the grant to the Levee Board. Therefore, not only is the *Fitzpatrick* case not decisive of the case at bar; it is not even applicable, for no question was presented therein as to the sufficiency *vel non* of a transfer by the State to the Levee Board.

POINT 3.

Prescription Runs against the Rights of a Tax Debtor while the Title to the Property Adjudicated is in the State.

The Court of Appeals ruled (R. 119) that, until redemption, the tax debtor has no right or title in the property

as the absolute title is vested in the State; that prescription could not run against the State and that the tax debtor had no right which could be prescribed against while the title was in the State. In so holding the court erred, for the decisions of the Supreme Court of Louisiana are to the effect that the State does not acquire a perfect title by virtue of a tax adjudication, but merely an inchoate one. *Gamet's Estate v. Lindner*, 159 La. 658, 663, 106 So. 22; *Sitges v. St. Bernard Syndicate*, 169 La. 674, 678, 125 So. 850; *State ex rel. Tulane Homestead Ass'n v. Montgomery*, 185 La. 777, 778, 171 So. 28. Cf. *Charbonnet v. Forschler*, 138 La. 279, 70 So. 224. The same rule applies to all adjudicatees (as distinguished from the State or City) during the period of redemption. *Moore v. Boagni*, 111 La. 490, 35 So. 716. Accordingly, since the State has not acquired *all* of the title of the tax debtor, it follows that *some* of the title rights remain in the tax debtor. *Louisiana Civil Code, Article 3521*, provides that prescription "runs against *all persons*, unless they are included in some exception established by law". There is no exception expressly established by law in favor of a tax debtor. The title rights which he retains are distinct and different from the title acquired by the State and hence are not protected by the rule that prescription does not run against the State. Therefore, we submit, the title rights of the tax debtor, whatever they may be, will be lost when another acquires what would, in the absence of the tax adjudication, have been a good prescriptive title to the property. And in the instant case we do not believe that it can be disputed that, but for the tax adjudication, the defendants would have a good and valid prescriptive title to said property *as against the plaintiffs*

herein. As a matter of common justice, it is submitted that one who has neglected his property and slept on his rights for forty-three years should not be permitted to hide behind the skirts of the State when his neglect is brought home to him.

POINT 4.

The Prescription of Six Years applies to a Transfer by a Levee Board.

The District Court overruled defendants' plea of the prescription of six years provided by Louisiana Act 62 of 1912 upon the sole basis that said statute applies only to *patents* issued by a governmental agency, and that there was no "patent" at issue in this case. (R. 77.) This ruling was affirmed by the Court of Appeals without comment. (R. 114-122.)

Section 1 of Act 62 of 1912 provides:

> "Be it enacted by the General Assembly of the State of Louisiana, etc., That all suits or proceedings of the State of Louisiana, private corporations, partnerships or persons to vacate and annul any patent issued by the State of Louisiana, duly signed by the Governor of the State and the Register of the State Land Office, and of record in the State Land Office, or any transfer of property by any sub-division of the State, shall be brought only within six years of the issuance of patent, provided, that suits to annul patents previously issued shall be brought within six years from the passage of this Act."

It will be noted that said statute in express terms applies to "any *transfer* of property by any sub-division of the State" and is not limited to "any *patent*". It would seem that under the plain terms of the statute the prescription would apply to a transfer by a levee board, and that the failure of the Court of Appeals to uphold said plea was error.

POINT 5.

In the Alternative, the Court should hold this Matter under Advisement until a Final Determination by the State Court.

In view of the authorities hereinafter cited, it is believed that the Circuit Court of Appeals erred in failing to grant a rehearing after its attention was called to the pending state court suit involving the same issues. However, in the event that this Honorable Court should not be disposed to grant certiorari for this reason, or for any of the other above reasons, then defendants urge in the alternative, the following argument:

In the case of *"Wm. S. Lovell et als. v. Andrew Fitzpatrick, et als."*, No. 11,193 of the Docket of the 17th Judicial District Court for the Parish of Terrebonne, State of Louisiana, a judgment was rendered on April 8, 1941, (an excerpt of pertinent portions of said judgment being attached hereto as Exhibit A). The plaintiffs in this case were likewise the plaintiffs in that case and the land involved in that case was included in the same instrument executed by the Register of the State Land Office which

defendants in this case claim to have been a valid transfer of the title to the land from the State of Louisiana to the Board of Commissioners of the Atchafalaya Basin Levee District. In that case the defendants made the contention, and the court held, that the said instrument was sufficient to operate as a transfer to the Levee Board. Accordingly, the decision of the state court, involving exactly the same factual situation, was directly contrary to the decision of the Circuit Court of Appeals in the instant case. The plaintiffs in said state court case have not as yet taken an appeal from said judgment.

If the plaintiffs do appeal from said judgment (and it is our understanding that such is their intention) then the very questions involved in the instant case will shortly have to be passed upon by the Supreme Court of Louisiana. And in view of the well known fact that affirmances greatly exceed reversals in number, it seems probable that the decision of the Supreme Court of Louisiana will be contrary to that of the Fifth Circuit. This Court has recently had occasion to state that "it is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship". *Fidelity Union Trust Co. v. Field*, No. 32, decided December 9, 1940.

See also: *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

On the other hand, if the plaintiffs decide to take no appeal from the judgment of the state court, and permit said judgment to become final, and this Honorable Court

does not grant to defendants the relief prayed for, a manifest injustice will have been done to defendants, for, through the accident of Federal jurisdiction, the defendants will have been divested of their title to the property in question, while if the action had been brought in the state courts defendants' title would have been vindicated. Furthermore, if no appeal is taken from said judgment *it will then be the only final pronouncement by a state court* on the question decided therein. In *West v. American Teleph. & Teleg. Co.*, Nos. 44 and 45, decided December 9, 1940, this court stated that the obvious purpose of Section 34 of the Judiciary Act (the "Rules of Decision" statute) was to prevent the existence of two divergent systems of law, one for the state courts and one for the federal courts, and that that object would be thwarted if the federal courts were permitted to make their own rules of decision when the highest court of the state had not spoken. Your Honors went on to say:

> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts *which are nevertheless laws of the state* although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule *merely because it has not received the sanction of the highest state court,* even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much it may have

> departed from prior decisions of the federal courts. See Erie R. Co. v. Tompkins, supra (304 U. S. 78, 82 L. ed. 1194, 58 S. Ct. 817, 114 ALR 1487); Russell v. Todd, supra (309 US 293, 84 L. ed. 762, 60 S. Ct. 527)." (Italics added.)

The case then held that a decision of an intermediate appellate court of a state is binding upon a federal court unless it is convinced that the highest court of the state would hold otherwise.

If the law of a state may be found in a decision of an intermediate court, it should also be found in a *final* decision of a lower court, if there are no indications that the court of last resort would decide otherwise; this result being almost *a priori* from the language of the *West* case above quoted. In addition, in the case of *Fidelity Union Trust Co. v. Field, supra,* this Court held that a decision of the Chancery Court of New Jersey was entitled to the same respect as a decision of the New Jersey Intermediate appellate court (Supreme Court of New Jersey) in so far as it announced state law. Your Honors seemed to stress the fact that, in that state, equity decrees are entered by the Chancellor whose decisions are subject to review, like those of the Supreme Court, by the Court of Errors and Appeals. Although the Louisiana judicial hierarchy is set up in a different manner, Your Honors' comparison in the *Field* case is remarkably *a propos* here. In Louisiana, the District Court (no distinction being made between law and equity) is the court of general trial jurisdiction *(La. Const. Art. VII, Sec. 33)* whose decrees are entered by a District Judge. In cases, such as the state court case now under discussion, involving more than Two Thousand Dollars (other than personal injury suits) the

decree of the district judge is reviewable only by the Supreme Court of Louisiana *(La. Const. Art. VII, Secs. 10, 29.)* In cases involving Two Thousand Dollars and less, or involving personal injuries, the judgments of the Courts of Appeal are also reviewable only by the Supreme Court *(La. Const. Art. VII, Sec. 11)*. Thus, in a case involving more than Two Thousand Dollars, the Louisiana district court's decree, like that of the New Jersey Chancery Court, is reviewable only by the highest court of the state, and would seem to be equally as effective as the decree of the New Jersey Chancery Court. The parallel is so striking that the *Field* case should be absolutely controlling here.

In a recent decision of this Court, in which the prior jurisprudence was fully discussed, it was held that a reviewing Federal court is bound to follow the state law even though that law only came into existence or expression after the decision of the Federal lower court. *Vandenbark v. Owens-Illinois Glass Company,* No. 141, decided January 6, 1941. And in two matters before this Court at this term, applications for certiorari were held under advisement for several months, after the Court's attention had been called to the fact that the identical question was pending in the state courts of Minnesota and after the Court had been requested to withhold decision until the determination of the issue in the state courts. Upon the decision of the question by the state courts, this Honorable Court then granted certiorari and reversed the ruling of the lower court *per curiam. The City Company of New York v. Stern,* No. 79, decided March 31, 1941; *Chase Securities Corporation v. Vogel,* No. 89, decided March 31, 1941.

It is submitted that, in the light of the above cases, this Court, in the event that it does not grant certiorari upon the grounds heretofore discussed, should hold this proceeding under advisement until such time as the Louisiana Supreme Court shall have passed upon the question, or the decision of the District Court shall have become unappealable, and should then act accordingly. Otherwise, in the light of the above discussion, a conflict between state and federal rulings would appear to be highly probable.

CONCLUSION.

The defendants believe that they have shown that error was committed by the Circuit Court of Appeals for the Fifth Circuit in rendering judgment against them on the question of title, and that the questions involved are of such importance as to warrant the issuance by this Court of a writ of certiorari. However, in the event that this Court should not see fit to issue said writ in due time, then defendants submit that, in order to prevent there being a conflict between the State and Federal jurisprudence, this Honorable Court should hold this matter under advisement until a final decision by the State court on the issues involved.

All of which is respectfully submitted.

ROBERTS C. MILLING,
Attorney for Cross-Petitioners.

HAYWOOD H. HILLYER, JR.,
Of Counsel.